parties" would likely lead a reviewing court to find that the agency's actions were not justified.[33] Adopting different policies for U.S. market entry by IGO affiliates based only on the date of the affiliate's incorporation serves no plausible policy rationale, and would be arbitrary and capricious. A Further Notice of Proposed Rulemaking is required in this proceeding or alternatively, the Commission should establish a separate proceeding regarding the issue of IGO affiliate entry.[34] The issue of ICO's entry into the U.S. is a subset of such a proceeding, and therefore should not dictate its outcome.

E. The Commission Should Not Allow a Decision in the Pending Comsat/ICO Procurement Proceeding To Prejudge IGO Affiliate Market Entry Policies

The Commission is currently considering the extent to which ICO is independent from Inmarsat in the Comsat/ICO Procurement proceeding.[35] Because a decision in the Comsat/ICO Procurement proceeding might impact ICO's entry into the U.S., and because the record in the proceeding has become stale due to the passage of time, the Commission should refrain from

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33 F.J. Vollmer Co., Inc. v. Magaw, 102 F.3d 591, 595 (D.C. Cir. 1996) (emphasis added). Accord, Federal Election Commission v. Rose, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("an agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard").

34 Establishing a separate proceeding to treat IGO affiliate entry would enable the Commission to adequately develop a record on this issue, without delaying the Commission's implementation of the WTO requirements in this proceeding.

35 DISCO II at ¶ 71.

prejudging any market entry issues until the policies and rules regarding IGO affiliate entry into the U.S. are developed in this proceeding. Comsat's application was filed May 10, 1995. Since 1995, there have been numerous developments in the telecommunications industry, satellite market, and the relationships between ICO, Inmarsat and Comsat. Furthermore, since then, the General Accounting Office has reviewed these topics and issued two reports that identify and discuss the potential for anti-competitive behavior by IGOs and their affiliates.[36] The Comsat/ICO Procurement proceeding has been overtaken by developments like the WTO Agreement, and market entry issues should be considered in light of these new developments.

IV. APPLICATION PROCESSING POLICIES MUST BE DESIGNED TO PROMOTE FAIR AND OPEN COMPETITION AMONG ALL SYSTEMS

In comments on DISCO II, Loral and Globalstar™ pointed out that there are two important policy considerations in adopting application processing procedures.[37] First, to promote fair and effective competition between U.S. and non-U.S. satellite operators, the procedures adopted to authorize access to non-U.S. satellites must constitute a regulatory regime that does not favor one set of applicants and authorized service

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36 See Discussion of First GAO Report and Second GAO Report at Section III (A) *supra*.

37 L/Q Licensee, Inc. and Loral Space & Communications Ltd., DISCO II Comments (July 15, 1996).

providers. Second, because the spectrum available for satellite services is finite and cannot accommodate all applicants, the Commission's licensing policies must provide sufficient flexibility for the Commission to prevent market distortions that could arise as a result of allocation of limited spectrum resources or licensing conditions for use of the spectrum. Maintaining equivalent regulatory treatment of, and imposing the same terms and conditions for use of spectrum on, U.S. and non-U.S. operators does not violate the United States' "national treatment" obligation under the WTO Agreement.

However, as the Commission recognizes, compliance with these policy goals is complicated with respect to satellite services because it is possible for foreign administrations to authorize launch and operation of space stations which can transmit to and receive signals from within the United States. Accordingly, there is no single authorization procedure in which both U.S. and non-U.S. satellite service providers must participate that could be used to ensure equivalent treatment. Despite this gap, the proposals in the FNPRM provide a good starting point for the policies and procedures necessary to regulate entry by non-U.S. satellite service providers and to achieve the open competitive environment envisioned by the WTO Agreement. Loral and Globalstar™ provide the following comments and recommendations to improve these initial proposals.

A. The Commission Must Treat U.S. and Non-U.S. Satellite Systems Equitably in the Licensing Process

The Commission correctly recognizes that a request for authority to access a satellite system licensed by a foreign administration will generally be submitted as an earth station application.[38] The Commission also correctly recognizes that the authority to access spectrum granted pursuant to such an earth station application would be equivalent to the authority granted to a U.S.-licensed satellite system operator and/or service provider pursuant to complementary space station and earth station authorizations. Accordingly, Loral and Globalstar™ agree that, where U.S. and non-U.S. entities seek to use the same spectrum resources, the Commission should treat the earth station and space station applications as equivalent and process such requests together. The "letter of intent" appears to be a necessary addition to address the concerns recognized by the Commission.[39] By establishing such a regime for regulation of non-U.S. satellite service providers, the Commission can provide a process in which U.S. and non-U.S. entities can be authorized to access spectrum on the same terms and conditions.

Given this framework, which appears appropriate, it is not clear what the Commission means when it states that the

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38 FNPRM at ¶ 47.

39 FNPRM at ¶ 51.

processing of applications for satellite systems licensed by WTO members would be "streamlined."[40] If a non-U.S. applicant is placed in a processing round to obtain authority for spectrum access, then it should have the same regulatory status as U.S. applicants, and streamlining does not appear an appropriate concept.

Moreover, were the Commission to apply a presumption of lawfulness, as in the case of international Section 214 certificates, "streamlining" would appear to treat a non-U.S. applicant more favorably than U.S. applicants. In this regard, "streamlining" is certainly not the goal of or required by the WTO, and could provide an inappropriate precedent for the United States' "most favored nation" obligation under the agreement. Therefore, the Commission should make clear that the concept of "streamlining" is limited to the policy that the Commission will not use the ECO-Sat test to determine whether the public interest supports grant of the request for authority to access a satellite licensed by a WTO member country.

Similar concerns arise regarding the Commission's statement that an opponent of market entry by such satellite system would have to demonstrate "that grant would pose a very high risk to competition in the United States satellite market that could not be addressed by conditions that we could impose on

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40 FNPRM at ¶ 18.

the authorization."[41] The Communications Act of 1934, as amended, requires the Commission to adopt licensing standards for applicants to use radio frequencies within the United States, and applicants have the burden of demonstrating compliance.[42] To shift the burden to opponents to demonstrate why such requests should not be granted under an undefined, subjective and one-dimensional criterion appears to result in non-U.S. satellite systems being treated more favorably than U.S. satellite systems. Given the United States' most-favored nation obligation under the WTO, such a policy could vitiate any attempt by the Commission to reference "national treatment" as a ground for specific action on a request to access a non-U.S.-licensed satellite system.[43] Accordingly, Loral and Globalstar™ recommend that the Commission restrict "streamlining" to the issue of whether it is necessary to apply the ECO-Sat test.

B. The Commission Must Impose Similar Terms and Conditions on Authorized U.S. and non-U.S. Satellite Systems

While earth station applications and letters of intent provide a framework for receiving and considering requests for market entry by non-U.S. satellite systems, the Commission must

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41 FNPRM at ¶ 13; see also id. at ¶ 18.

42 See 47 U.S.C. §§ 303, 308(b), 309(a).

43 Indeed, the Commission has proposed to require that non-U.S. satellite systems comply with requirements imposed upon U.S. satellite systems. FNPRM at ¶¶ 39-44.

also recognize that treating non-U.S. systems equivalently to U.S. applicants requires more than parallel processing. If access to a non-U.S. satellite system is granted pursuant to an earth station application or "letter of intent" as opposed to a space station application, the terms and conditions of such authorization should be equivalent to those imposed upon U.S. space station licensees. For example:

1. Ancillary Operating Costs. In certain services, the Commission imposes upon satellite licensees ancillary costs for use of the spectrum. Specifically, the Commission has proposed to require MSS licensees to pay for relocating incumbent terrestrial services in the spectrum allocated in the United States for 2 GHz MSS.[44] In this situation, the Commission should require an entity seeking access to that spectrum over a non-U.S. satellite to pay as well. Otherwise, the non-U.S. system would be unjustly enriched by getting the benefit of access to cleared spectrum without sharing the financial burden imposed upon U.S. licensees. This would give non-U.S. operators an unfair advantage in domestic and international markets and distort competition with U.S. operators.

2. Implementation Milestones. The Commission proposes to accept requests to access non-U.S. satellite systems that are

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44 See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, FCC 97-93 (released Mar. 14, 1997).

not yet licensed by a foreign administration.[45] Obviously, if the system were not to receive a license from the foreign administration, any U.S. authority should be revoked. To avoid the difficulties of such a procedure, the Commission should not accept requests to access non-U.S. satellites unless the satellite has been licensed by a foreign administration.

Moreover, just as there are implementation milestones imposed upon U.S. licensees to ensure efficient use of spectrum resources, the Commission must impose similar deadlines to initiate service for non-U.S. systems. The Commission should not tolerate warehousing of spectrum by non-U.S. operators any more than by U.S.-licensed operators.

3. Regulatory Fees. Once operational, U.S.-licensed space stations are subject to substantial annual regulatory fees.[46] These fees are significantly higher than those for earth station authorizations. A regulatory fee structure in which two satellite systems provide similar services, and require similar attention after licensing, but pay vastly different regulatory fees is inconsistent with the concept of equivalent regulatory treatment.

Although this proceeding is not the appropriate forum to consider the level of regulatory fees, the Commission appears

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45 FNPRM at ¶ 52.

46 See 47 C.F.R. § 1.1156.

to have the authority to rectify this potential imbalance. Section 159(b)(3) of the Communications Act permits the Commission to amend the regulatory fees set by statute when the Commission determines that amendment of the schedule of fees is necessary due to changes in law. The statute provides that "in making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."[47]

The WTO Agreement, implementation of the United States' obligations thereunder, and the procedures for market entry to be adopted in this proceeding not only change the nature of the services to be provided by the Commission but also represent significant changes in law, which may justify a change in the regulatory fee schedule.[48] That is, the Commission has not previously considered an open market for non-U.S.-licensed satellite systems, and the need to regulate provision of space segment services through earth station applications. The Commission should consider these changes in the U.S. market for

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47 47 U.S.C. § 159(b)(3).

48 See COMSAT Corp. v. FCC, 114 F.3d 223 (D.C. Cir. 1997) (finding that Section 159(b)(3) did not provide authority for Commission to adopt a "signatory fee" which was not in response to a change in law or rulemaking proceeding).

satellite services when it considers the appropriate level of regulatory fees for fiscal year 1998.

4. Universal Service Obligations. In adopting rules on universal service obligations, the Commission recognized that international services present complex policy issues.[49] The Commission's Order in that proceeding exempts non-U.S. licensed satellite operators that provide international service to or from the United States, but that do not provide domestic interstate satellite services, from universal service contribution obligations. Conversely, the universal service Order appears to impose contribution obligations on U.S. licensed service providers (including Loral Skynet®) that provide international (originating or terminating in the United States) and domestic interstate satellite services. This would be a patently unfair result that is at odds with the WTO national treatment principle. Indeed, in light of the fact that the disparate effects on satellite service providers caused by the universal service rules would be anything but "minimal",[50] the Commission should revisit this issue. Specifically, the Commission must ensure that its rules do not arbitrarily advantage entities that provide international satellite services to or from the United States but that do not provide domestic, interstate satellite services.

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49 *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157 (Released May 8, 1997), at ¶¶ 778-779.

50 See id. at ¶ 779.

5. User Terminals. The Commission has sought comment on the impact of the draft Memorandum of Understanding ("MOU") on global mobile personal communications by satellite ("GMPCS") adopted by the ITU World Telecommunications Policy Forum.[51] Loral and Globalstar™ have been involved in the development of the draft MOU have signed the MOU, and continue to support its stated goals and implementation. Recognition of the proposals therein would serve the public interest by significantly advancing the ability of U.S.-licensed MSS systems to provide global service.

Loral and Globalstar™ submit that adoption of the MOU by the United States does not impact the Commission's current licensing regime for blanket authorizations for mobile earth terminals ("METs"). The MOU addresses "circulation" of GMPCS terminals, i.e., the ability of a subscriber to roam with an MET outside its home country and the arrangements necessary for carriage of the terminal across international borders, such as type approval and equipment marking. The MOU specifically preserves the right of signatories "to issue blanket or class licenses for GMPCS Terminals or to exempt the GMPCS Terminals from licensing."[52] Accordingly, the Commission should not view

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51 FNPRM at ¶ 59.

52 Memorandum of Understanding-GMPCS, Article 2, ¶ 5 (Geneva July 17-18, 1997).

the MOU as restricting its ability to grant blanket authorization for METs which access non-U.S. satellite systems.

Indeed, Loral and Globalstar™ pointed out in their comments in DISCO II that the process of licensing METs provides a means to regulate the potential for interference into U.S.-licensed satellite systems within the U.S. As the Commission pointed out in DISCO II, "we lack the power to order a non-U.S. space station to cease operating or otherwise remedy harmful interference."[53] However, the Commission can address this concern by requiring the earth station applicant to demonstrate the absence of the potential for interference into existing or proposed U.S. systems and to be responsible for ensuring that METs within the United States do not communicate with a non-U.S. satellite if such interference would occur.

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53 DISCO II at ¶ 49.

C. The Commission Should Require Non-U.S. Satellite Systems to Demonstrate Compliance with Applicable Legal and Technical Standards Which Impact Competitive or Interference Concerns

As in DISCO II, the Commission proposes to require non-U.S. satellite systems to meet the legal and technical requirements of U.S. satellite systems.[54] The earth station applicant or sender of a "letter of intent" would be required to attach to its application information demonstrating compliance with these standards.[55] Loral and Globalstar™ agree that this requirement does not re-license foreign satellite systems.[56] Requiring a demonstration that a non-U.S. licensed space station meets all U.S. legal and technical qualifications is designed to ensure that grant of authority does not raise interference or competitive concerns.

The Commission may, however, ultimately restrict application of its rules and policies regarding authorizations for earth stations accessing foreign satellites to those parameters which impact U.S. systems either as a result of technical or competitive factors. The Commission should, for example, require non-U.S. applicants to meet those technical characteristics which affect the system's capability to avoid imposing or receiving harmful interference, e.g., compliance with

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54 FNPRM at ¶¶ 39-44; DISCO II at ¶ 53.

55 FNPRM at ¶ 60; DISCO II at ¶ 61.

56 FNPRM at ¶ 47.

a U.S. band plan and out-of-band emissions limits, and as the Commission noted, compliance with 2° orbital spacing parameters for geostationary satellites in the C- and Ku-band Fixed-Satellite Service.[57]

With respect to rules which have little or no impact on the interference environment or competition, a non-U.S. system should be required to identify the parameters under which it was authorized by a foreign administration, specify the differences between the U.S. and foreign administration's requirements, and explain why the differences would not impact competition or interference. Because the impact of such differences may vary from system to system, it is not possible here to state with certainty which rules should be applied and which should not. Rather, the Commission's policy should be that the non-U.S. system must comply with all standards that would impact on competition and/or interference concerns. A non-U.S. system may request exemption from application of a rule only when it specifically identifies the rule(s) and reason(s) for which it believes it non-compliance is justified. Interested parties should have an opportunity to comment on the differences identified by the applicant and to explain why compliance is necessary to avoid a substantial impact on competition or interference affecting the public interest in granting the

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57 See Licensing of Space Stations in the Domestic-Fixed Satellite Service, 54 RR 2d 577 (1983).

application. The Commission can entertain waiver requests for differences which raise no such concerns.

D. No License Should Be Required for Receive-Only Earth Stations

The Commission proposes to require licenses for receive-only earth stations communicating with non-U.S.-licensed space stations.[58] However, as the Commission notes, receive-only earth stations are passive and cannot cause interference to other radio stations. Because of these characteristics, an attempt to enforce a licensing requirement is likely to be futile.

Loral and Globalstar™ recommend that the Commission abandon the proposal to license receive-only earth stations unless the operator requires interference protection. Reception of transmissions from non-U.S.-licensed satellites which have been coordinated with the United States pursuant to ITU procedures should not cause interference or technical concerns. If transmissions from the satellite have not been coordinated, this approach is not the most effective point for enforcement. Rather, the Commission should require that the satellite licensee or service provider file a "letter of intent" to serve United States' markets. The Commission should require that copies of the appropriate space network Appendix 5 and 54 ITU filings be submitted with the "letter of intent."

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58 FNPRM at ¶ 56.

E. The Commission Should Modify FCC 312 to Be Consistent with the United States' WTO Commitments

In the FNPRM, the Commission sought comment on whether there should be changes to the new space and earth station application form FCC 312.[59] As the Commission recognizes, satellite-delivered broadcast services were not included in the United States' WTO commitment. Accordingly, the Commission should specifically request on the form whether the services to be provided by an FSS operator include broadcast video programming services for direct reception by consumers. The current version of the form simply identifies services in broad categories, such as Fixed-Satellite and Mobile-Satellite.

Second, in addition to the information required by the Commission's Rules, the Commission should require entities seeking to access non-U.S. satellites provide copies of the Appendix 4 and S4 for the satellite system submitted to the ITU with their requests. These documents would provide additional information on the satellite system parameters and would enable improved and timely review by the Commission's Staff and interested parties.

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59 FNPRM at ¶ 62.

V. CONCLUSION

For the reasons discussed above, Loral and Globalstar™ respectfully ask the Commission to consider these Comments and adopt policies consistent with the views expressed herein.

Respectfully submitted,

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